SUPREME COURT, U.S.

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Supreme Court of the United States

October Term, 1964

No. 542

BENJAMIN PISANO,

Petitioner,

against

S. S. BENNY SKOU, her engines, boiler, tackle, etc., in rem, and OVE SKOU, D/S OVE SKOU, A/S and D/S af 1937 A/S,

Respondent,

against

JOHN T. CLARK & SON,

Respondent-Impleaded.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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on the Petition.

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Respondent-Impleaded.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit, entered in the above entitled matter on June 7, 1965.

Opinions of the Courts Below

The opinion of the United States District Court for the Southern District of New York, Honorable Irving Ben Cooper, in favor of respondent and respondent-impleaded, reported at 220 F. Supp. 901, is set out in the appendix to this petition at pages 9-16.

The opinion of the United States Court of Appeals for the Second Circuit, affirming the decree of the District Court, unreported to date, is set out in the appendix to this petition at pages 19-21.

Jurisdiction

This suit, arising out of a maritime tort, and in the Admiralty and Maritime jurisdiction, was brought in the United States District Court for the Southern District of New York, in Admiralty.

The opinion of the District Court and decree entered thereon, dismissing the libel (and the impleading petition of respondent, Ove Skou), was appealed from by the petitioner.

The decision of the United States Court of Appeals for the Second Circuit, affirming the decree of the District Court, was filed and decree entered thereon on June 7, 1965.

The jurisdiction of the honorable Court is invoked pursuant to 28 U. S. C. § 1254(1).

Question Presented

Whether the Court below erred in negating the primary duty of the shipowner to provide a safe place to work and the duty of the stevedore to perform the cargo operation in a workmanlike manner, in view of the failure by the ship's officers and the stevedore boss to inspect, detect and correct the open and obvious hazardous condition of the preventer rigging, of which they knew or should have known, thus causing or contributing to the accident and petitioner's injuries.

Statutes Invoked

There are no statutes invoked herein.

Statement of Facts

Libelant, Pisano, a longshoreman, was employed by Clark, respondent-impleaded, a stevedoring firm engaged by respondent, Ove Skou, the owner of the "Benny Skou", which was berthed in the North River, New York City. On July 22, 1960, Pisano was on board the Benny Skou in charge of a gang of three longshoremen loading cargo at # 5 hatch. In the course of his duties at 1:00 o'clock the previous afternoon, July 21, 1960, Pisano himself had improperly rigged the port or inshore cargo boom, which was being used as the horizontal or burton boom, by failing to take a half-hitch knot as a safety device in the preventer wire, on the open deck, used as the main anchor for the boom. From that time until 5:00 P. M. on the 21st, cargo was continuously loaded onto the vessel. The work continued on the 22nd, starting at 8:00 A. M., that day, to 9:00 A. M. when the up-and-down boom was repositioned, and thereafter.

At about 10:00 A. M. Pisano properly stationed himself by the hatch to supervise the loading of two tons of ingots. As the load was lifted aboard, the burton boom swung sharply inboard out of control. The ingots carried by the boom were dumped to the deck, knocking a stack of hatchboards into Pisano and causing him to suffer substantial injuries.

Testimony was that the shipowner's Second Mate, its highest ranking officer aboard the vessel, had the duty to look after the cargo operation. Other deck officers were also aboard taking "care of ship's interests", that cargo be loaded in safety, that ship's equipment be used properly and to watch the loading operation.

The Mate stated that he was in the vicinity of the hatch in the afternoon of the 21st but made no inspection of the preventer rigging, that he did inspect both the up-and-down

and burton booms when the former was repositioned at 9:00 A. M. on the 22nd.

The stevedore hatch boss, in charge of the work gang, including Pisano, had the duty to instruct the men and to supervise the rigging, the use of the booms and the loading of cargo and had a primary function to see that "everything is in good working condition", that "everything is secured right", to supervise the men, to see that the men were doing their work and to look to their safety, walking around the deck as part of his duties to observe the rigging working conditions and "to see that such operation goes on correctly and in a safe manner".

The hatch boss was on deck the afternoon of the 21st and the morning of the 22nd and made no comment about the rigging although he inspected it as he always did.

The District Court's opinion was that "the absence of this knot made the preventer unsuitable for its intended purpose", that . . . "The M/S Benny Skou was unseaworthy at the time of (petitioner's) accident, since the preventer wire was not in a condition reasonably suitable for its intended use. The unseaworthiness resulting from the manner in which the preventer was rigged was the sole proximate cause of the injuries to (petitioner) . . . Since the vessel was unseaworthy only because of the absence of the half-hitch, a condition created by Pisano, this court finds him guilty of 100% contributory negligence".

The Court of Appeals affirmed, finding that "the shipowner or his employees had no duty to inspect every knot in the rigging of every cargo boom aboard ship. At most a general inspection of conditions on board rather than minute, continuous supervision of every detail entrusted to a responsible stevedoring firm was all that was needed to satisfy the duty of reasonable care under the circumstances."

Reasons for Granting the Writ

The decision of the Court below appears to be in conflict with decisions of other Courts in *Crumady* v. *Fisser*, 358 U. S. 423; *Connolly* v. *Weyerhaeuser*, 236 F. 2d 848, sub nom. *Weyerhaeuser* v. *Nacirema*, 355 U. S. 563; *Beard* v. *Ellerman*, 289 F. 2d 210, sub nom. *Atlantic* v. *Ellerman*, 369 U. S. 355; *Skovgaard* v. *Tungus*, 252 F. 2d 14, 358 U. S. 588; *Gutierrez* v. *Waterman*, 373 U. S. 206; *Ferrante* v. *Swedish*, 331 F. 2d 571 (3C); *Knox* v. *United*, 249 F. 2d 354 (3C); *Brabazon* v. *Belships*, 202 F. 2d 904 (3C); *Aldridge* v. *States*, 265 F. 2d 554 (9C), and would seem to call for review of the entire matter by this Honorable Court.

The Court below rejected the concept of any duty by the shipowner to inspect the rigging of the preventer wire created by the petitioner some twenty-one hours, through six hours of actual work operation time, before petitioner was injured.

Further, the Court below rejected the thought that the stevedore had any responsibility to inspect, detect and correct any defects in its work performance throughout the operational period.

The defective condition herein was created by the petitioner twenty-one hours before the accident, six hours of actual work time, a period when both the shipowner, through its officers, and the stevedore should have been inspecting and supervising the work operation and maintaining the vessel. The rigging of the preventer wire was on the open deck, itself open for observation. The testimony of the Mate and of the longshoremen made it perfectly clear that part of the shipowner's and stevedore's duties was to inspect the rigging, that at times they did and at times they did not.

The preventer wire rigging was of extreme importance to the entire stevedore operation since upon its proper completion rested the safety of the entire ship.

As such, the failure of ship's officers to inspect the burton boom rigging on the open deck over the extended period of time or, if there was an inspection, to detect the improperly rigged preventer can only be characterized as an irresponsible surrender of duty—an intervening negligent force subsequent to the petitioner's misdeed. That failure to act was the proximate cause of the accident for which the shipowner should be liable.

The failure of proper inspection of the rigging by the stevedore boss so as to detect the lack of the half-hitch was a failure to perform in a workmanlike manner, *Palazzolo* v. *Pan-Atlantic,* 211 F. 2d 277, *sub nom. Ryan* v. *Pan-Atlantic,* 350 U. S. 124; *Italia* v. *Oregon,* 376 U. S. 315; *Ferrante* v. *Swedish, supra; Nicroli* v. *Den,* 332 F. 2d 651 (2C); *DeGioia* v. *United,* 304 F. 2d 421 (2C); *Caputo* v. *United,* 311 F. 2d 413 (2C); *Santomarco* v. *United States,* 277 F. 2d 255 (2C); *Smith* v. *Jugosalvenska,* 278 F. 2d 176 (4C); *Calmar* v. *Nacirema,* 266 F. 2d 79 (4C), giving rise to liability upon the shipowner, with indemnification over from the stevedore.

It would appear that if the petitioner failed to properly knot the preventer, he has paid for it grievously. The trial Court laid the entire burden of the ship's safety upon him, negating entirely the overwhelming and primary responsibility of the shipowner to provide a safe place to work and of the petitioner's superiors to perform the cargo operations safely. While the petitioner's conduct was deemed sufficient to defeat his cause of action, the failure of all others over a period of six working hours and an actual twenty-one hours, was not held even to have *contributed* to the existence of the obvious, unseaworthy and long standing condition at 10:00 A. M. on July 22, 1960.

The negation of that duty resting upon the shipowner and upon the stevedore was error in failing to give proper weight to the duty visited upon the shipowner and upon the stevedore to inspect, detect and correct what hazardous condition was known, or should have been known, to exist.

While not attempting to establish an iron rule of extent of inspection necessary to meet the shipowner's duty to inspect,, the Courts have discussed that responsibility on the basis of general supervision and of an open and obvious defect, when not within the concept of general supervision.

The Court below restricted the demand solely to a general inspection, thus creating the right of a shipowner to blind itself to any defect outside its narrow scope of supervision when it knew or should have known of the danger facing the working longshoremen.

The creation of an ulitimate responsibility for the safety of the vessel upon the individual longshoreman can only lead to the destruction of the primary and non-delegable duty resting upon the shipowner and the stevedore to provide safety to those working aboard the vessel, aiding in the furtherance of ship's business.

As such, this Honorable Court should now reject any concept that would further the failure to inspect, detect and correct obvious and open defects and which would throw the cost of industrial injury upon those least able to afford that burden.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated: September 3, 1965.

Respectfully submitted,

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HARVEY GOLDSTEIN,
on the Petition.

APPENDIX

Opinion of United States District Court for the Southern District of New York

This is an action for personal injuries sustained by libelant, a longshoreman, aboard respondent's vessel. Jurisdiction is based upon the general maritime law of the United States. The trial was held before the court, sitting without a jury.[1]

Libelant was injured on July 22, 1960 aboard the M/S Benny Skou, a vessel owned, operated and controlled by the respondent, Ove Skou, etc. (hereinafter Ove Skou). At that time, libelant was employed by the respondent-impleaded, John T. Clark & Son, and was lawfully aboard the vessel performing ship's services.

Upon arrival of the M/S Benny Skou, in New York City, she berthed south of Pier 51, North River, port side to pier, with her bow facing in toward the shore.

On the afternoon of July 21, 1960, libelant and his fellow employees spotted the booms for the #5 hatch. These booms, which were located forward of the hatch, were rigged with a married fall, i.e., the lines from each of the winches were shackled together and then linked to a common cargo hook. The starboard, or offshore boom, was positioned over the hatch and was being used as the up-and-down boom. The port, or inshore boom, was positioned over the pier and was being used as the burton boom.

The longshoremen, after positioning the booms, secured them by means of various guy lines and preventer wires. A schooner guy, running between the heads of the two booms, was secured and a guy line was run from the head of the burton boom forward to a padeye on the deck. This

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[1] At the outset of the trial libelant moved to discontinue as against Anchor Line, Ltd., and upon consent of all parties, the libel, and all other claims, made by and against Anchor Line, were dismissed and Anchor Line was eliminated from the case.

guy line was composed of manila rope approximately 2½" in circumference. The preventer wire, 6 x 19, was of the same circumference. The manner in which the preventer wire was rigged is one of the main disputes.

Approximately four months prior to the accident, the M/S Benny Skou was docked in New York City and similar cargo operations were performed. At that time, the preventer wire for the burton boom at the #5 hatch had been run from the head of the boom to the bottom horn of a vertical cleat, and then figure-eighted around the cleat to secure it—apparently the procedure followed theretofore. However, on that occasion, the bottom horn of the cleat snapped off and the preventer loosened. Whereupon the hatch boss, one Willie Cremona, instructed the longshoremen (among whom was the libelant herein) to rerig the preventer by putting it through a swinging-link ring bolt on the deck, then running it through the eye of a turnbuckle on the mast stay (approximately 3-4′ aft), back through the swinging-link, then through the eye on the stay for a second time and back through the swinging-link for a third time. The longshoremen were told to put a half-hitch in the preventer wire and tie off the free end with a piece of manila yarn. The purpose of the half-hitch was to stop the preventer from running when stress was applied. The end of the wire was tied off to keep the half-hitch from becoming undone.

Between the time that the horn of the cleat snapped off and the time of libelant's accident, the M/S Benny Skou called at New York three or four times. The broken cleat was never repaired and the preventer wire continued to be rigged in the manner described above.

On July 21, 1960, the booms were positioned and the preventer wire rigged in a manner generally as just described and more particularly discussed below. The following morning, when the longshoremen returned to work the booms were in the same position. The loading of general cargo began with libelant acting as gangwayman.

At 9 A.M. on July 22, 1960, libelant went on his hour relief, Engel, one of libelant's co-workers, took over as gangwayman. During this time, the loading of general cargo was completed and two aluminum ingots (weighing a total of 1½-2 tons) were placed on a pallet for loading. The draft was hooked up and raised slightly to check the load.[2]

At this point, at approximately 10 A.M., Pisano returned to his duties, and Engel, after ascertaining that everything was satisfactory, ordered the draft lowered to the dock, and returned to his duties as winchman. Libelant then assumed the duties of gangwayman and supervised the loading of the ingots. As the draft began to come athwartships, Pisano stationed himself at the after end, port side of the hatch, in order to direct operations. At that point, he was standing between the coaming of the hatch and the hatch board covers stacked on the inshore side.

Suddenly, a rumbling, tearing noise was heard, the burton boom swung laterally towards the hatch, and the draft fell against the hatchboards hurling them upon libelant. Pisano sustained comminuted fractures of the left tibia and fibula, was removed from the vessel by stretcher and taken to the hospital by ambulance.

After the accident, it was seen that the rope guy had parted approximately 30′ above the deck and the preventer wire was slack, indicating that it must have run, since there was no break in it.

The overwhelming weight of the credible testimony established that rigging the preventer wire by running it through the swinging-link three times, interspersed with two turns through the eye in the mast stay, followed by a half-hitch and a lashing off of the end of the wire (this method will hereafter be referred to as the non-cleat method) was as satisfactory a method of rigging as figure-eighting the preventer around the cleat. The total evidence

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[2] Maximum stress is not placed upon the lines and booms by this small lifting.

revealed that the non-cleat method was a safe and suitable method for securing the preventer wire. In point of fact, during the calls in New York between the time the cleat broke and the accident to libelant, the preventer wire was rigged in the non-cleat method without mishap.

Since the proper rigging of the preventer wire in the non-cleat method was satisfactory for the purposes intended, the fact that the cleat was broken has no bearing on this case. A broken cleat would render a vessel unseaworthy insofar as procedures involving the employment of the cleat are concerned. In the instant case, however, a perfectly suitable alternative method of rigging had been adopted. Thus, though the broken cleat might make the vessel unseaworthy, such unseaworthiness was clearly not the proximate cause of libelant's accident. Only if no other safe method of rigging the preventer was available could the condition of the cleat be considered a proximate cause of libelant's accident.

The proper rigging of the preventer in the non-cleat method required that a half-hitch be placed in it after all the turns had been taken. As already pointed out, the purpose of the half-hitch was to keep the preventer from running when stress was applied to it.

This particular half-hitch is a vital element in the case. Further discussion of it makes necessary a few remarks about the respective functions of the guy line and the preventer wire. The guy line was used initially to position the boom. It was then secured to aid in keeping the boom in position. In order to accomplish this, the tension on it and the preventer wire, were equalized. However, the preventer wire was the most important line to maintain the position of the boom and keep it from swinging laterally. As such, it was designed to bear most of the strain, and therefore must be taut. The half-hitch was put in it to stop the preventer from running when a strain is placed on it.

At the trial, Pisano was not questioned as to how the preventer wire was rigged the day before his accident or who rigged it. But during the two examinations before

trial (Libelant's Exhibits 14 & 15) he stated in effect that he rigged the preventer and tied it off by lashing the end without tying a half-hitch in the wire.

The Second Mate of the M/S Benny Skou, Nielsen, stated that he looked at the preventer after the accident, and saw the end still lashed off (though part of the manila yarn had been cut). However, he found no half-hitch present in the wire.

This court finds that libelant, himself, rigged the preventer, and in the course of doing so unfortunately failed to put in a half-hitch. The absence of this knot made the preventer unsuitable for its intended purpose because when strain was applied, the preventer began to run and a greater stress was placed upon the guy line. This increased strain, which the guy line was not meant to bear, caused it to break. When this happened, the boom swung laterally across the ship, and the draft of ingots struck the hatch boards, resulting in libelant's injuries.

From the total evidence, this is the most plausible explanation of the cause of the accident. The various theories advanced by libelant as to the causes of the accident are not sustained by the facts. The evidence to support them falls far short of sustaining the libelant's burden of proof, both quantitatively and qualitatively.

As to the rope guy line, there was no evidence that it broke before the preventer ran. The expert testimony was all to the effect that the guy line was not meant to withstand the total stress of the boom while a draft of cargo was being burtoned thwartships.[3] The testimony further revealed that the running of the preventer put an abnormal strain on the guy line causing it to break.

Nor is there any evidence that the guy line was defective. Even assuming, arguendo, that the guy broke first because of some internal defective conditions, the preventer wire could

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[3] The greatest strain on the rig, booms, lines and preventer occurs while the cargo was moved laterally, rather than when the draft was merely raised or lowered.

have withstood the additional strain if it had been rigged properly in the non-cleat method. But, without a half-hitch in it, the wire would have run with the extra strain on it. The boom would then have moved laterally due to the absence of the half-hitch.

There has been testimony that the preventer wire was in a rusted, kinky and bent condition; that the longshoremen were unable to straighten the wire with their hands as they secured it; that because of this they were unable to secure the preventer properly and that there was some slack in it. The evidence on these points is insufficient and consequently unconvincing.

Libelant's theory apparently is that the guy line broke because of a defective condition; that the release in tension allowed the burton boom to swing; that the boom was able to swing because of the slack in the preventer and that once having taken up the slack, the one-ton boom continued to move laterally and the presence of the half-hitch would not have been able to stop it.

The proof does not support this theory. Inference piled upon inference can not substitute for tangible evidence. In addition to the unsatisfactory testimony as to kinks and rust, Engels stated that he especially noticed this condition in the last 10 feet of the wire. Yet libelant himself testified that when he rigged the preventer there was about 10 feet of wire left after it was lashed. Thus, the very portion of the wire which was identified as being most kinky, would have no affect on the accident. Slack resulting from kinks, bends and rust would only play a part if it were in that portion of the preventer leading from the head of the burton boom to the swinging-link, or in that part of the preventer wound through the swinging-link and the eye on the turnbuckle stay. This court finds that the preventer wire was not in such a kinky, rusted or bent condition as to produce slack in the wire or to have any other causal relation to the accident.

We should mention two changes in the loading operation just before the accident.

First: The weight of cargo being loaded was almost doubled. On the afternoon of July 21 and the early morning of July 22, 1960 the longshoremen were loading general cargo which weighed approximately 1 ton. At the time of the accident, the first draft of aluminum ingots was being loaded. The weight of this draft was approximately 1½-2 tons. Though within the safe working load for the booms, it greatly increased the strain on the preventer wire.

Second: Between 9 A.M. and 10 A.M. on July 22 (prior to loading the ingots), the offshore up-and-down boom had been repositioned by lowering its head in order to reach the after end of the number 5 hatch. The expert testimony indicated that the effect of this was also to increase the strain on the preventer wire and guy line for the burton boom.

The combination of these two factors caused the preventer to start running. The undue strain placed on the guy line caused it to break, and the boom to swing laterally.

Libelant maintains that there is no testimony that the rigging done by him on July 21 was still in existence at the time of the accident. This is inaccurate. The overwhelming weight of testimony (principally from libelant's own witnesses) is that the booms were not repositioned or rerigged when the longshoremen returned to work on July 22. Actually, during the work that morning, only the up-and-down boom was moved.

Libelant's claim that the demonstration model of the non-cleat method (Respondent's Exhibits D, D, and D2) was deceptive in without merit. This model was not introduced to show the tensile strength of the wire but merely to demonstrate to the court the proper manner by which the preventer should be rigged when the non-cleat method is used.

Respondent's contention that libelant was guilty of contributory negligence because of the place in which he was standing at the time of the accident is likewise without merit. Under the circumstances, libelant was in a safe

place to properly perform his work. Nor is there evidence that the hatchboards were improperly stacked or placed on the deck.

In brief summation then, this court finds that it was safe and proper to rig the preventer wire by the non-cleat method. But the rigging in the instant case was inadequate since there was no half-hitch. The absence of this knot allowed the preventer to run for it was unable to withstand the stress it was meant to absorb. The M/S Benny Skou was unseaworthy at the time of libelant's accident, since the preventer wire was not in a condition reasonably suitable for its intended use. The unseaworthiness, resulting from the manner in which the preventer was rigged, was the sole proximate cause of the injuries to libelant.

However, libelant himself was the person who rigged the preventer and failed to put a half-hitch in it. Pisano's failure to do this made him guilty of contributory negligence. Since the vessel was unseaworthy only because of the absence of the half-hitch, a condition created by Pisano, this court finds him guilty of 100% contributory negligence.

Accordingly, judgment shall be entered for respondent, Ove Skou, against libelant. The third-party action and all claims arising therefrom are dismissed.

This opinion shall constitute the court's findings of fact and conclusions of law.

So ordered:

Irving Ben Cooper,
United States District Judge.

New York, N. Y.
August 2, 1963

Decree of the United States District Court for the Southern District of New York

This suit having come on for trial before the Honorable Irving Ben Cooper, U.S.D.J., on May 20, 21, 22, 23, 24, 27 and 28, 1963, and Alvin I. Apfelberg, Esq., having appeared as proctor for libelant, Messrs. Haight, Gardner, Poor & Havens, David P. H. Watson and Robert K. Marzik of counsel, having appeared as proctors for respondent Ove Skou, et al., and Messrs. Alexander, Ash & Schwartz, Joseph Arthur Cohen, of counsel, having appeared as proctors for respondent-impleaded, and the Court, having at the close of the trial on May 28, 1963, reserved decision and having asked for the submission of post-trial memoranda, and proctors for the respective parties having thereafter submitted said memoranda, and the Court, after due deliberation, having handed down its memorandum opinion, dated August 2, 1963, and filed in the Office of the Clerk of the United States District Court for the Southern District of New York on that same date, in which the Court held that judgment was to be entered for respondent Ove Skou, et al., as against libelant, and that the third-party actions and all claims arising therefrom were to be dismissed, it is now

ADJUDGED AND DECREED, that the libel of Benjamin Pisano, libelant, against respondent Ove Skou, D/S Ove Skou A/S & D/S of 1937 A/S be and the same hereby is dismissed with prejudice and with costs to be taxed by the Clerk of this Court, and it is further

ADJUDGED AND DECREED, that the impleading petition of respondent-petitioner, Ove Skou, D/S Ove Skou A/S & D/S of 1937 A/S against John T. Clark & Son be and the same hereby is dismissed as moot with costs to be taxed by the Clerk of this Court, and it is further

ADJUDGED AND DECREED, that the counter-claim of John T. Clark & Son, respondent-impleaded, against respondent-petitioner Ove Skou, D/S Ove Skou A/S & D/S of 1937 A/S be and the same hereby is dismissed as moot, and it is further

ADJUDGED AND DECREED, that the counter-claim of respondent-impleaded, John T. Clark & Son, against libelant, Benjamin Pisano, be and the same hereby is dismissed as moot.

Dated: New York, N. Y., August 16, 1963.

IRVING BEN COOPER,
U. S. D. J.

Opinion of the United States Court of Appeals for the Second Circuit

Before:

MOORE, KAUFMAN and HAYS,
Circuit Judges.

Appeal by the libellant Benjamin Pisano from a decree of the District Court for the Southern District of New York, Irving Ben Cooper, *J.*, sitting without a jury, 220 F. Supp. 901 (1963), dismissing a libel against the S. S. "Benny Skou" *in rem* and her owner, Ove Skou, dismissing as moot the impleading petition of respondent-petitioner Skou against John T. Clark & Son, respondent-impleaded, and dismissing as moot counterclaims of John T. Clark & Son against Skou and Pisano. Cross-appeal by respondent-impleaded.

HARVEY GOLDSTEIN, New York, New York (Alvin P. Apfelberg, New York, New York, of counsel, Goldstein & Sterenfeld, New York, New York, on the brief), for Libellant-Appellant.

DAVID P. H. WATSON, New York, New York (Haight, Gardner, Poor & Havens, New York, N. Y., of counsel), for Respondent-Petitioner-Appellee.

JOSEPH ARTHUR COHEN, New York, New York, (Alexander, Ash & Schwartz, Sidney A. Schwartz, New York, New York, of counsel), for Respondent-Impleaded-Appellee.

MOORE, *Circuit Judge*:

Libellant, Benjamin Pisano, appeals from a decree dismissing his action for personal injuries against the S.S. Benny Skou, *in rem* and Ove Skou, the shipowner.

Pisano was employed by Clark, a stevedoring firm engaged by Ove Skou, the owner of the "Benny Skou," which

was berthed at Pier 51, North River. On July 22, 1960, Pisano was on board the Benny Skou in charge of a gang of three longshoremen loading cargo at #5 hatch. In the course of his duties, Pisano himself rigged the port or inshore cargo boom which was being used as the horizontal or burton boom. At about 10:00 A.M. Pisano properly stationed himself by the hatch to supervise the loading of two tons of ingots. As the load was lifted aboard, the burton boom swung sharply inboard out of control. The ingots carried by the boom were dumped to the deck, knocking a stack of hatchboards into Pisano and causing him to suffer substantial injuries.

The District Court dismissed Pisano's libel and the indemnification claims, which depended on the disposition of the libel, on the ground that Pisano's injury was due entirely to his own carelessness in failing to take a half-hitch as a safety device in a preventer wire used as the main anchor for the burton boom.

Pisano argues that he presented sufficient evidence to show that the accident was caused by some other fault in the rigging of the boom or at least that the absence of a half-hitch in the preventer wire was not the cause of the accident. The record reveals that Pisano presented no concrete proof of the cause of the accident. Pisano himself testified on examination before trial that he had, in fact, carried out his duty to rig the burton boom but had not taken a half-hitch in the preventer. An investigation after the accident established that the preventer had run free and there was ample expert testimony to establish that the preventer would not have come loose under the strain of a two-ton load if a half-hitch had been taken. In this context, the trial court's conclusion that Pisano was "guilty of 100% contributory negligence," 220 F. Supp. at 905, was reasonable and must be affirmed because not shown to be clearly erroneous. *Gruja* v. *United States Lines Co.*, 337 F. 2d 375 (2d Cir. 1964).

Pisano also argues that the trial court erred in denying him any recovery since the shipowner had a duty to pro-

vide safe working conditions aboard ship. However, the court's conclusion that "the unseaworthiness [of the "Benny Skou"], resulting from the manner in which the preventer was rigged, was the *sole* proximate cause of the injuries to libelant," 220 F. Supp. at 905 (emphasis supplied), indicates that the court considered the shipowner's possible liability and resolved the issues against Pisano. The District Court would have had to strain to find negligence in this case since the shipowner or his employees had no duty to inspect every knot in the rigging of every cargo boom aboard ship. At most a general inspection of conditions on board rather than minute, continuous supervision of every detail entrusted to a responsible stevedoring firm was all that was needed to satisfy the duty of reasonable care under the circumstances. And, even if the shipowner must share in the abstract any liability for breach of the seaworthiness warranty with the impleaded respondent Clark, *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 89-100 (1946), it is clear that compliance with the warranty does not require an accident-free vessel. *Mitchell* v. *Trawler Racer, Inc.,* 362 U. S. 539 (1960).

Affirmed.

Decree of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of June, one thousand nine hundred and sixty-five.

Present:

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
Circuit Judges.

[SAME TITLE]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs to respondent appellee SS Benny Skou, etc., and to respondent impleaded appellee John T. Clark & Son.

A. DANIEL FUSARO
Clerk